

Fly high the Puerto Rican flag

Michael Sean Winters | Aug. 6, 2009 NCR Today

The Puerto Rican flag is hanging on the front of my porch today to celebrate the confirmation of Sonia Sotomayor as an associate justice of the Supreme Court. I must confess the guilty pleasure of watching conservatives find ways to denounce her. My personal favorite is watching Lou Dobbs display his not so thinly veiled nativism, the sense of entitlement that comes from the "we were here first" mentality. This is especially rich when nativists are holding forth in places like Los Angeles, San Antonio, Florida, or other places with Anglo names. First? Ever heard of Junipero Serra? Ponce de Leon?

My favorite criticisms however are from those "principled" conservatives who say they cannot vote for anyone who fails to follow the original intent of the founders when interpreting the Constitution. They think every judge should somehow program their brain with all the knowledge and prejudices held by John Jay, the first Chief Justice and one of the principal authors of the Federalist Papers, and let it go at that.

But, there is a problem. Sotomayor is not only the first Hispanic on the Court ever, she will become the sixth Roman Catholic on the current Court. I wish conservative originalists would ask what the revered Mr. Jay would think of that. You see, long before he helped pen the Federalist Papers, Mr. Jay was a delegate to the First Continental Congress, for whom he penned "An Address to the People of Great Britain" which the Congress then approved. In 1774, among the many grievances of the English colonists was the Quebec Act which had granted toleration to Catholics in Canada. Therein he wrote of Congress's concern that Canada, "daily swelling with Catholic emigrants" would become "fit instruments in the hands of power to reduce the ancient, free, Protestant colonies to the same state of slavery with themselves." He went on: "Nor can we suppress our astonishment that a British parliament should ever consent to establish in that country a religion [Catholicism] that has deluged your island in blood, and dispersed impiety, bigotry, persecution, murder, and rebellion through every part of the world."

The problem with the originalists is that the founders, who did fine work, nonetheless had different ambitions for their project, which is why they fell into different political parties almost immediately, a phenomenon that has served the interests of liberty well but which was explicitly not intended by any of the founders. So, when someone invokes the "original intent of the founders" ask them which founder and which intent. Hamilton and Jay or Madison and Jefferson? And, if they have the gall to cite Jay, ask them about that Address to the People of Great Britain. I do not fault Mr. Jay particularly for holding the prejudices of his time and learning but it is strange that today's conservatives should fault Sotomayor for holding the prejudices of her time and learning.

The good news is that she is being confirmed anyway. A woman whose ancestry is from the island which received the first bishop to arrive in the Western Hemisphere in 1513, 207 years before Plymouth Rock, will not sit on the Court. I look forward to hearing Lou Dobbs denounce "from our studios in Los Angeles."

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